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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In the Matter of | ) |
| | ) |
| Policies and Rules | ) |
| Governing Interstate Pay-Per-Call | ) CC Docket No. 96-146 |
| and Other Information Services Pursuant to | ) |
| the Telecommunications Act of 1996 | ) |
| | ) |
| In the Matter of | ) |
| | ) |
| Policies and Rules Implementing | ) CC Docket No. 93-22 |
| the Telephone Disclosure and Dispute | ) |
| Resolution Act | ) |

# REPLY COMMENTS OF THE TELESERVICES INDUSTRY ASSOCIATION

Respectfully submitted,

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**REPLY COMMENTS OF THE TELESERVICES INDUSTRY ASSOCIATION**

The TeleServices Industry Association ("TSIA") hereby replies to the comments of the other parties on the Commission's Notice of Proposed Rule Making ("NPRM") submitted in the above-captioned proceeding.

Preliminary Statement

While the TSIA and other commenters support the Commission's efforts to implement the reforms of the Telecommunications Act of 1996 ("1996 Act"), many parties, TSIA included, recognize the need for certain modifications of the proposed regulations to more effectively implement the Commission's objectives in a manner that conforms with the mandates of Congress. In that regard, we will reply herein to comments of AT&T and others on the

Commission's tentative conclusion that any form of renumeration from a carrier to an information service provider constitutes per se evidence that the service must be offered exclusively through 900 numbers (NOPR ¶48). Based primarily upon the comments of AT&T and the Interactive Services Association ("ISA"), TSIA recommends that a rebuttable presumption be established that tariffed rates, for calls terminating into an information service, falling within a reasonable range of the dominant carriers be deemed permissible. In this manner, the objective of Congress of eliminating high tariffs for information services would be fulfilled. Conversely, the proposals of the Commission and AT&T linking the standard to commission payments would require re-writing the statute, which neither the Commission nor AT&T has the power to do. Moreover, the per se rules elimination of the availability of information services at standard toll rates would dis-serve the public and inhibit competition.

In addition, a number of parties submit proposals that go well beyond the scope of the areas on which the Commission requests comments. We will address certain of these comments concerning call screening data bases, secondary collections, electronic execution of agreements, and the exemption for goods and services. In general, we applaud efforts that would make available additional information to service providers. For example, addition of the 900 blocking database to LIDB and ready access to calling card validation would enhance our ability to serve the public by denying access to restricted households and deterring fraud upon the subscriber and service provided alike. On the other hand, efforts to prevent electronic transmission of agreements, secondary collections, or billing for goods and services seek to improperly reform the law, without the required legislation, and are issues more appropriate for the FTC.

1.

**The payment of commissions by carriers for stimulating traffic promotes low cost competition and is therefore in the public interest.**

It is clearly the goal of the Commission to promote competition among information services and among carriers to foster high quality services at low rates. Unfortunately, as stated in our initial comments, the Commission's proposal to eliminate commission payments between carriers and information service providers would retard competition by restricting the available dialing platforms and thus stymie the provision of quality low-cost services to customers. In its comments, AT&T, on the surface at least, supports this position by noting that the Commission's objective is to prohibit carriers from filing "unjustifiably high tariffs, and then passing on a portion of their proceeds to an IP that ostensively provides a 'free' information service. However, the proposal sweeps too broadly because it would prohibit not only abusive practices, but also arrangements that are both benign and economically efficient." (AT&T Comments, p. 5). Instead of promoting an alternative that assures fair competition and eliminates "unjustifiably high tariff" charges, AT&T seeks adoption of a standard that would permit it continue engaging in payment of commissions but prohibit all local and foreign carriers from doing so.

In our initial comments, we reference the practice of AT&T of entering into TSAA arrangements by virtue of which commissions may be paid to information service providers or other telecommunications customers. AT&T recognizes that this practice is threatened by the Commission's tentative conclusion that such arrangements require use of 900 numbers. Thus, AT&T fashions a proposal whereby a rebuttable presumption would replace the per se evidence rule. In turn, the TSAA arrangement would overcome the rebuttable presumption by demonstrating a cost basis for the payment of commissions through the avoidance of access charges by AT&T. In other words, because the commissions to information providers are cost-effective for AT&T, TSAA arrangements should be acceptable. In contrast, AT&T argues that local exchange carriers, CAPS and foreign carriers would likely fall within the prohibition on payment of commissions. Obviously, the end result is that AT&T places itself on top of the mountain looking down upon the competitive carriers who are left to the valley below.

It is clear that the real concern of AT&T has nothing to do with consumer protection, but rather is an attempt to avoid what it perceives as "unusually high terminating access rates" incurred by AT&T in certain regions (p. 7). AT&T's concern over access charges falls well outside the scope of the NPRM and is more appropriately raised in the upcoming FCC proceeding on access reform and jurisdictional separations. This proceeding should not be used as a vehicle for AT&T to secure a competitive advantage or to avoid payment of access charges.

This is not to say that TSIA in any way opposes TSAA arrangements. Rather, we believe such arrangements are entirely proper, in no way are prohibited by Congress, enhance competition both for information and telecommunications services, and benefit consumers through lower rates without compromising consumer protections. In fact, AT&T raises numerous valid reasons to support payment of commissions by all carriers. AT&T argues that under TSAA arrangements, the caller incurs the normal tariff charge, not a premium rate for accessing information services. Thus, TSSA "arrangements do not result in higher charges to consumers for information services. All AT&T customers pay the same tariff rates for the same service, regardless of whether or not those services terminate over TSAAs." (p.6). Of course, the same holds true for commission payments by local exchange carriers, CAPS and other alternative LECs, foreign PTTs, COCOTs, cellular service providers and other telecommunications carriers. The ability of consumers to access information services at normal toll or local rates is a consumer benefit and has not been the subject of extensive complaints. Thus, it has not been an area for which Congress has seen fit to enact limiting legislation. In a letter to the Commission in connection with this rulemaking, Congressman Bart Gordon, sponsor of the TDDRA and the amendments thereto in section 701 of the 1996 Act, specifically notes that it was not the legislative intent to prohibit direct dial access to information services. With respect to international services, he states that "I do not think it prudent or practical to ban the provision of information services through the use of 011 international access, as there may be issues concerning international treaties and laws that govern these international services, in light of the fact that there is no surcharge or premium paid by consumers for international information services over 011." Similarly, there is no surcharge or premium for domestic dialed information services as well.

Thus, the proper focus of the Commission should be not on compensation or renumeration between carriers and information providers, but rather on the rates charged to the consumers. It is the assessment of excessive rates to the public that Congress has addressed and is the scope of the FCC's rulemaking in this proceeding. This concern may be addressed in a manner that does not restrict competition and inhibit the availability of low cost information services to the public.

2.

**A rebuttable presumption should be adopted that a charge to a caller by a carrier for accessing an information service is unreasonable, and subject to the TDDRA, if it exceeds a margin above the highest rate charged by the dominant carriers for the route.**

In its comments, AT&T requests the Commission to adopt a rebuttable presumption. While the concept of a rebuttable presumption is a good one in that it properly balances the need to prohibit conduct that is abusive to consumers with the individual carrier's circumstances, the AT&T proposal fails for the reasons previously discussed. In contrast, the ISA proposes "that an interstate information service be classified as 'pay-per-call' if the cost to call the service exceeds, by more than a de minimis amount, the cost of a comparable content-neutral call to the same location at the same time." ISA suggests that the comparative rate be that of the "highest content-neutral rate offered by the three major IXC's" for the same route. (ISA comments, p. 4). TSIA recommends that a combination of the two concepts would foster competition, lower prices to consumers, be consistent with the intent of Congress and do so in a manner that conforms with the due process and free speech rights of the service provider.

In the TDDRA and the 1996 Act, Congress has stated that charges for access to information services that are greater than normal transport rates should fall within the definition of pay-per-call. No where does Congress state that calls for which the caller only incurs normal toll charges are to be subjected to the pay-per-call rules. Thus, a rule aimed at compensation arrangements between service providers and carriers misses the mark. It is high priced tariffed services that Congress addressed in both the definition of pay-per-call and in eliminating the tariff exemption thereto. To cure the charging of excessive tariff rates for information services, a rebuttable presumption should arise that if the charge to the caller is within a reasonable range of the content-neutral highest tariffed rate one of the major carriers for calls to the same location at the same time, then the call should not be classified as pay-per-call. Thus, the rate of one of the major carriers becomes the benchmark rate for determining the justness and reasonableness of a charge to a caller for accessing an information service through a non-900 number. If the charge to the caller exceeds the major carrier's rates by an unreasonable amount, then a rebuttable presumption would arise that the call is for information services and subject to the pay-per-call rules. Recognizing that a small carrier does not have the same economies of scale as the major carriers, a margin or range (i.e. 5%-15%) deviating from the benchmark rate should be determined by the Commission based upon the Commission's expertise in reviewing and establishing just and reasonable rates.

TSIA believes that this proposal addresses Congress's concern that tariffs not be filed for the express purpose of charging consumers excessive rates for accessing information services. Unlike the proposals based upon payment of commissions, TSIA's proposal does not require the Commission to go beyond its power by expanding the definition of pay-per-call. The deficiency of both the Commission's per se evidence standard and AT&T's proposal are that calls for which the caller only incurs normal tariffed rates would be held to be pay-per-call. This would be rewriting the definition of pay-per-call; something this Commission has no power to do. Nor should the definition be rewritten. TDDRA is not meant to be an anti-competition Act, but rather consumer protection legislation against premium rates. It makes little sense to force information services to cease offering services that are reached, for example, through Sprint's ten-cents-per-minute rate, so that consumers can obtain the same information through a 900 service where the charge is more than one dollar per minute due to the high charges to providers by the carrier's providing 900 service. TSIA's proposed rebuttable presumption properly balances consumer protection with the promotion of competition.

3.

**The rules and regulations of the Commission implementing the TDDRA and 1996 Act must be content-neutral.**

To the extent the parties suggest that steps be taken to prohibit services based upon the content of the service, such proposals run afoul of the First Amendment. (see comments of the Alliance of Young Families - an apparently sham organization probably formed by an information service provider to promote its own self-interest in a shameful manner). Similarly, to the extent carriers seek authority to disconnect services, in their own discretion, such proposals run afoul of the basic procedural due process rights of the service providers. (See comments of GTE - a legitimate carrier).

In adopting regulations, the government may only adopt a scheme for regulating speech which constitutes "the least restrictive means to further the articulated interest." Sable Communications of California, Inc. v. Federal Communications Commission, 492 U.S. 115 (1989); ACLU v. Reno, 929 F.Supp. 824 (E.D.PA., June 11, 1996). Moreover, "the government bears the heavy burden of demonstrating that the compelling state interest cannot be served by restrictions that are less intrusive on protective forms of expression." Carlin Communications, Inc. v. Federal Communications Commission, 749 F.2d 113, 121 (2d Cir. 1984). With regard to regulations, "the government must show a fit between the legislatures ends and the means chosen to accomplish that ends." Board of Trustees of State University of New York v. Fox, 492 U.S.

469 (1988). Any action not in conformance with these standards results in an unconstitutional action in violation of the First Amendment.

Thus, regulations inhibiting the manner of speech of information providers that are not applicable to non-information providers would, absent compelling reasons and a lack of less restrictive methods, rise to the level of a content-based infringement on free speech. Yet, some commentators seek to limit all information service applications to 900 service or to impose restrictions on information providers without any review of less restrictive alternatives or the legislature's ends.

For example, the carriers own services would be afforded special exemptions. The 1996 Acts eliminated barriers to the provision by BOCs of, among other things, electronic publishing and telemessaging. In a recent Notice of Proposed Rulemaking, Docket 96-152, this Commission recognized that "the provision by the BOCs of such interLATA information services offers the prospect of fostering vigorous competition among providers of such services. Because of the unique assets BOCs possess, BOCs can offer a widely recognized brand name that is associated with telecommunication services, the benefits of 'one-stop shopping', and other advantages of vertical integration." (NPRM, Docket 96-152, released July 18, 1996, ¶6). BOCs would be free to offer their information services over intra and interLATAs. Revenues for message units or toll charges by callers to access the services support the cost of operation of the information service. Similarly, BOCs utilize 800 service to take orders for electronic publishing. Electronic publishing is defined as the dissemination, provision, publication or sale to an unaffiliated entity or person of any one or more of the following: news (including sports); entertainment (other than interactive games) ; and similar information. In contrast, the per se rule would restrict information services use of POTS lines, and thereby the free speech of non-BOC information providers.

Moreover, commenters efforts to restrict electronic transmission of agreements or to restrict issuance of calling cards would chill use of such mechanisms to seminate information. Thus, before adopting any suggestion that restricts the manner of speech, either directly or indirectly through economic sanctions, the Commission would have to demonstrate that there are no less restrictive methods for providing consumer protections.

GTE seeks broader authority to terminate services to information services. Any action by the Commission or carrier to terminate service to an information provider based upon some per se rule or carrier interpretation of law, without an opportunity to cure the alleged wrong or for a hearing, would violate the Fifth Amendment due process rights of the service providers. Freedman v. Maryland, 380 U.S. 51 (1965). At a minimum, the carrier that believes a service provider is violating Commissions regulations must, prior to ceasing provision of services, provide written notice well in advance of termination, be subject to judicial third-party review by the Commission or other neutral body, the burden of proof of a violation must reside with the carrier and a procedure must provide for prompt judicial or third-party review. Absent these safeguards, the termination of information service programs by a carrier would curtail expression protected by the First Amendment and run afoul of the Freedman test for the suppression of speech. Of course, the common carrier has the duty to provide service on a non-discriminatory, content-neutral basis. The National Association Broadcast v. Federal Communications Commission, 740 F2d 1190 (D.C. Cir. 1984). Accordingly, in reviewing each and every proposal, TSIA respectfully requests the Commission to properly balance the objective of the regulation with the potential impact on free speech. In so doing, the Commission must determine whether there is a less restrictive manner for restricting the speech of service providers and, if so, must pursue the alternative method.

4.

**Information services should have full and timely access to**
**<u>LIDB and BNA. The database should be expanded to include 900 blocking.</u>**

Southwestern Bell asks the Commission to amend its rules to "explicitly provide that the Information Provider ("IP") must validate an end user's calling card through the Local Exchange Carrier's ("LECs") Line Information Database ("LIDB") before the IP can assess charges to the calling card." (Comments of Southwestern Bell, p. 1). TSIA supports this recommendation of Southwestern Bell. However, to ensure that the provision is not used in an anti-competitive fashion or to stymie free speech, the complimentary requirement is that the LECs provide clearinghouses and information services with full, real-time and non-discriminatory access to LIDB and Billing Name and Address ("BNA").

**<u>LIDB</u>**

Southwestern Bell further states that the "amended rules should also require the true called number [800 or 900] to be entered for validation, thus allowing LIDB to check for 800 or 900 blocking. These two changes will result in fewer customer complaints and fewer unauthorized charges." (p.2). We agree with the sentiment, but note a deficiency in Southwestern Bell's statements. Namely, LECs fail to share with information services the database with respect to their customers that have requested blocking for 900 number access.

The availability of blocking information would address most of the perceived concerns surrounding access to information services over non-900 numbers. Timely and economical access to 900 blocking information, provided through a separate line item in LIDB, would enable information services to screen out calls from households that have requested pay-per-call and information services blocking. This would be true whether the call was made over 800 or other non-900 number. (See Pilgrim Telephone, Inc.'s Comments, p.44). By affording information services real-time access to blocking databases, it will provide subscribers with a greatly enhanced ability to control the delivery and subsequent billing of the services. In the event an information service failed to check the database, and the customer had requested blocking, then the charge could be properly written-off and secondary collection activities prohibited. Consumer protection would be strengthened by inclusion of the 900 blocking database in LIDB.

**BNA**

Similarly, the provision of real-time access to the LECs BNA databases would enable information services to verify subscriber information for the purpose of assisting in determining if the caller is authorized to enter into a subscription agreement that would result in charges appearing on the monthly telephone bill. For example, a check could be performed to match the BNA for the ANI of the calling party with information obtained directly from the caller by the information service. Address verification is an integral part of the Visa, Master Card and American Express authentication process. It has proven to be extremely successful in controlling unauthorized use of credit cards. However, currently, information service provider or billing clearinghouse requests for BNA from LECs are not fulfilled until it is too late to be of much assistance. It often takes up to six months to receive a response to a request for the BNA matching a telephone number. The requirement that LECs respond to requests for BNA either real-time or, at least, within seven days would afford information services the ability to utilize BNA to control unauthorized and fraudulent use of their services.

In sum, the availability of LIDB, including the 900 blocking data for all carriers, and BNA to information services in a real-time, cost-effective and non-discriminatory basis would enable information providers not only to screen calling cards but presubscription and other arrangements as well.

5.

**Artificial restrictions on the manner in which information services conduct operations would unduly interfere with the ability of the industry to conduct legitimate and normal business operations.**

In their zest to close any and all conceivable loopholes or methods of providing information services, some of the commenters would prohibit information service providers from even carrying out activities specifically permitted by the TDDRA. Other proposals that would place artificial prohibitions on the use of electronic transmission of agreements, secondary collections and billing for non-information goods and services fail to properly balance the desire to foster valuable information services with adequate consumer protections. Accordingly, any suggestions that would overreach or restrict normal business activities sanctioned by Congress must be rejected by the Commission.

**Secondary Collections**

One party suggests that the Commission should "circumscribe secondary collection activities." (Comments of Pacific Bell and Nevada Bell, p. 5). In adopting the

TDDRA, Congress specifically provided information service providers with the right to pursue collection of properly assessed charges. In so doing, Congress set up an extensive statutory scheme for handling billing disputes. The authority for adopting regulations governing billing disputes was assigned by Congress to the Federal Trade Commission. Adding to its other deficiencies, the request of Pacific Bell has been made in the wrong forum. Pacific Bell suggests that certain FCC administrative procedures be exhausted prior to pursuing secondary collection activities. The rules implemented by the FTC set forth a number of steps that must be undertaken prior to pursuing secondary collection activities. Customers are afforded the right to withhold payment pending review of the billing inquiry. (See 16 CFR Part §308.7(g)). The FTC also adopted restrictions on credit reporting and retaliatory actions. (§§308.7(i), (m)).

If following the extensive dispute resolution mechanism, the charge is found to be properly levied and therefore sustained, then secondary collection is appropriate. To the extent Pacific Bell receives inquires from consumers due to collection activities, it would most likely stem from the lag in receipt of charge back and uncollectible detail from the LEC by the service provider. It is common for an LEC to pass back an unpaid charge to the service provider that emanates from a call placed six to eighteen months earlier. After a year has passed, the caller is likely to deny any knowledge of the call ever being made and consequently notify the carrier of the collection activity. Under the FTC regulations, a caller has 60 days to dispute a charge. (§308.7(b)). If carriers held callers to the 60 day period provided by law, then timely collection of properly billed calls would be able to proceed. Due to the timeliness of the request for payment, the subscriber would more likely be able to recall, or investigate, the circumstances surrounding the call to the information service. Thus, Pacific Bell has an avenue to ameliorate its concerns through conforming its course of conduct with applicable law. TSIA requests the Commission to direct LECs and IXCs to conform their practices with the provisions of the FTC's regulations.

The proposal of Pacific Bell to limit secondary collections would be redundant to the protections afforded to consumers by the FTC. In contrast, the proposal of Pacific Bell that an IP show compliance with the Commission's rules prior to pursuing rightful collection activities would add nothing and fails to even indicate to whom such a showing would be made. Accordingly, the proposal of Pacific Bell should be denied.

**Electronic Transmission of Agreements**

Pacific Bell would also have the Commission prohibit transmission of presubscription agreements through electronic means. (p. 1). Thus, Pacific Bell would seek to eliminate a method provided by Congress. Congress specifically permits transmission of agreements through electronic means (47 U.S.C. 228(c)(7)). As MCI correctly notes, the agreement to be transmitted electronically must meet the same standards as the agreement provided by mail or through any other means. Accordingly, MCI concludes that additional safeguards are not needed. (p.4).

Recognizing that the law authorizes electronic transmission, Pacific Bell next suggests that if electronic transmission is permitted then there should be a 10-day lag prior to the provision of service. This provision would do at least as much harm to the customer as to the provider. It would require an artificial delay for provision of the information requested by the customer. As such, it would clearly inhibit the free flow of information and unduly and needlessly restrict the provision of information service. In our impatient society, the service provider would have to explain that federal regulations prohibit the timely provision of the requested information. This is an example of the proposed protection causing more harm to he consumer than good.

The intent of Congress in requiring a written agreement is to ensure that the customer has all of the information necessary to be an informed consumer. Electronic transmission of the terms of service will assist, not hinder, the customer in receiving the details of the presubscription arrangement in a rapid and efficient manner. This should be considered beneficial to consumers and not an evil to be over-regulated out of existence. Therefore, no additional regulation is warranted.

**Goods and Services**

The 1996 Act provides that a written agreement is not required "for any purchase of goods or of services that are not information services". (§701(a)(1)(c)). A number of commenters raise concern over the exception and seek to limit its scope. In so doing, the parties seek to reform the legislation. It is of course the obligation of the FCC to implement the statute as passed by Congress and not to change its provisions. Congress, for its part, directed the FCC to "revise its regulations to comply with the amendment" and not to alter or restrict the provisions as enacted by Congress. (Section 701(a)(2) of the 1996 Act).

More importantly, the proposals are not in the public's interest. For example, the National Association of Attorneys General ("NAAG") requests that the provision be limited to "transactions which do not involve charges being billed to a telephone subscriber's phone bill". (NAAG Comments, p.9). Although it states that "legitimate businesses would not be impacted," the opposite is true. Such a broad prohibition would prohibit telephone billing for everything from Internet access to voice storage and retrieval as well as other enhanced services. While this may not be the intent of NAAG, it would be the end result of adopting regulations that have not been fully explored or well thought through. TSIA recommends that the proposal of NAAG and other parties limiting the exception for goods and services be denied as not being in compliance with the dictates of Congress and contrary to the public interest.

## CONCLUSION

Based on the foregoing, TSIA respectfully requests the Commission to adopt the recommendations herein and in our initial comments. TSIA reaffirms its gratitude to the Commission for the opportunity to submit these reply comments.

Dated: New York, New York
September 16, 1996

Respectfully submitted,

TELESERVICES INDUSTRY ASSOCIATION

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